83-722

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

in the Supreme Court of the United States

ORVILLE MEYER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Counsel for Orville Meyer

QUESTION PRESENTED

Whether the "law of the case" doctrine can deprive an accused of his Fourth and Fifth Amendment rights to testify in support of his claim of standing to challenge a search and seizure where:

(1) at the motion to suppress hearing, the Magistrate informs the accused at the outset that he will be afforded an opportunity to testify if standing is not found at the conclusion of the hearing;

(2) the Magistrate finds standing, the district court agrees, and the accused therefore does not offer his testimony in support of standing;

(3) the government appeals the order of suppression and wins on the ground that standing was not established;

(4) following reversal, the district court, in violation of the Magistrate's representation to the accused that he would be allowed to testify to establish standing in the event standing were not found, refuses to allow the accused to testify to prove standing based upon "law of the case";

(5) upon appeal from his conviction, the panel agrees that the "law of the case" doctrine precludes the accused from proving standing, although he was never fairly afforded that opportunity, and was led to believe by the Magistrate that if standing were not found, he would be allowed to testify.

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656 F. 2d 979 (5th Cir., Unit B, 1981) .....

United States v. Torres,
___ F. 2d ___ (11th Cir. 1983)
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White v. Murtha,
377 F.2d 428 (5th Cir. 1967) .....

JUDGMENT AND OPINION OF THE COURT BELOW

On July 8, 1983, the United States Court of Appeals for the Eleventh Circuit filed an eight-page unpublished opinion affirming the convictions of the Petitioner. (App. 1-6) On September 1, 1983, the Eleventh Circuit entered an order denying the timely filed Petition for Rehearing. (App. 7-8)

JURISDICTION OF THIS COURT

This Petition is filed within sixty days of the Court of Appeals denial of the Petitioner's petition for rehearing on September 1, 1983.

The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. § 1254(1) and Rules 17 through 23 of this Court's rules.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth and Fifth Amendments to the Constitution.

STATEMENT OF THE CASE

On August 12, 1980, a hearing on the defendant's motion to suppress evidence was conducted before United States Magistrate Patricia Kyle in the United States District Court for the Southern District of Florida. Petitioner Meyer sought to suppress cocaine hidden in the apartment of one Steven Hodlow.

The government raised as a preliminary matter the issue of Meyer's standing to challenge the search and seizure. The Magistrate ruled that Meyer would not have to prove standing unless after the hearing, standing appeared to be at issue, in which event, *Meyer would be afforded the opportunity to testify*. (App.11)

Ultimately, Meyer did not testify as to standing because after presiding over the hearing on the motion to suppress, the Magistrate recommended suppression, finding specifically that Meyer had standing to challenge the search and seizure, and that the government had failed in its burden of proving the legality of the warrantless arrest, search and seizure.

The District Court, Judge Norman Roettger, agreed with the Magistrate and ordered suppression.

The government appealed the order of suppression on the ground that Meyer had failed to prove standing. The order of suppression was reversed. *United States v. Meyer*, 656 F. 2d 979 (5th Cir., Unit B, 1981).

Upon remand to the trial court, counsel for Meyer moved the District Court in writing and orally for a hearing on the motion to suppress in order to establish standing. Judge Roettger denied the motions.

The cause proceeded to jury trial. Meyer was convicted of conspiracy to possess with intent to distribute cocaine in Count I,

possession with intent to distribute cocaine in Count 2, distribution of cocaine in Count 3, and use of communication facility in the causation of a felony in Count 4; Meyer was committed to the custody of the Attorney General for treatment and supervision pursuant to the Youth Corrections Act on April 20, 1982. A timely appeal was taken to the Eleventh Circuit.

On appeal from the convictions, the panel affirmed in an unpublished opinion, rejecting Meyer's claim that he should have been afforded an opportunity to testify to prove standing. *United States v. Meyer*, ____ F.2d ____ (11th Cir. 1983) (Case No. 82-5397, opinion filed July 8, 1983). (App. 1-6).

Rehearing and rehearing en banc were sought. Denial was filed on September 1, 1983. (App. 7-8).

REASONS FOR GRANTING THE WRIT

A precedent setting error of exceptional importance has been committed in this case which has resulted in the deprivation of the Petitioner's fundamental due process Fifth Amendment right to be heard in court. In brief, the Petitioner was never afforded an opportunity to prove, through his testimony, that he had standing to challenge the search and seizure in question. The facts that gave rise to this claim have been recounted and are expounded upon as follows.

On August 12, 1980, a hearing on a motion to suppress was heard before the Honorable Patricia Kyle, United States Magistrate of the United States District Court, Southern District of Florida, Fort Lauderdale, Florida. The government raised as a preliminary matter the issue of the appellant's standing to challenge the search and seizure because the events occurred in the residence of a third party. At the *commencement* of the

hearing, the magistrate stated that if after the hearing, she were of the opinion that Meyer did not have standing, he would then have the opportunity to testify to prove standing:

> THE MAGISTRATE: [W]hen this is all over, if I believe that Mr. Meyer does not have standing in all or part of, I am going to give Mr. Sanford [counsel for Meyer] notice of that effect and, that, at that time if he wishes to bring Mr. Meyer forward to allow Mr. Meyer to testify and establish his standing, I will permit him to do so.

(App. 11) (Mr. Sanford did call Mr. Meyer to testify at the hearing, but for impeachment of a tangential issue, not as to standing, for the obvious reason that there was no such need, given the Magistrate's ruling.)

After the hearing on the motion to suppress, the Magistrate recommended that the evidence against Meyer be suppressed, finding specifically that Meyer had standing to challenge the search and seizure. The District Court, Judge Norman Roettger, agreed and ordered suppression. Thus, Meyer never testified to establish his standing.

Nevertheless, the government appealed, contending that Meyer had no standing. The order of suppression was reversed. *United States v. Meyer*, 656 F.2d 979 (5th Cir., Unit B, 1981).

Following the reversal, Meyer's counsel sought, by written and oral motion, the opportunity Meyer never had, namely to testify to those facts never adduced which would establish standing. Trial counsel brought to the attention of the district judge the ruling of the Magistrate. The trial court denied Meyer's request to testify on the ground that the reversal of the order of suppression was the "law of the case" and that he was bound by the reversal and not bound by the ruling of the Magistrate.

Thereafter, Meyer was jointly tried with co-defendant McMahon and was found guilty of conspiracy to possess and distribute cocaine, possession with intent to distribute cocaine, distribution of cocaine, and use of a communication facility in the commission of a felony. On appeal, Meyer raised as error the trial court's refusal to allow him to testify to establish standing.

On July 8, 1983, a panel of the Eleventh Circuit rejected the claim as follows:

> Appellants' second contention is that the district court erred when it failed to give them an opportunity to present evidence to establish their standing to challenge the constitutionality of a search of co-defendant Hodlow's apartment and the seizure of a kilogram of cocaine. The district judge declined to conduct a hearing on the standing issue because he believed the former Fifth Circuit had already determined that appellants lacked standing to make a Fourth Amendment challenge. Our review of the record indicates that the district judge was correct. In *United States v. Meyer, supra,* the former Fifth Circuit stated:
>
> > The issue on appeal is whether defendants had a legitimate expectation of privacy in the area where the cocaine was seized, entitling them to challenge the legality of the search and seizure. We hold they did not have this expectation, and reverse the district court order which granted their motions to suppress.
>
> 656 F.2d at 980.
>
> Appellants attempt to circumvent the former Fifth Circuit's holding by arguing that they did not have a full opportunity to present evidence of standing at the original suppression hearing and, therefore, that they should have been allowed to present *additional* evidence on the standing issue. The difficulty with this argument is that it was made

> and rejected on the previous appeal. In their reply brief, appellants note that in the prior appeal they argued that "even if standing had not been established, the defendants were entitled to prove standing at a new evidentiary hearing" in the district court. The former Fifth Circuit implicitly rejected this argument because, rather than remanding for a new evidentiary hearing, the court held that defendants had failed to establish an expectation of privacy in the area where the cocaine was seized and reversed the suppression order. 656 F.2d at 980-82. Thus, the district court correctly applied the "law of the case" doctrine, *see White v. Murtha*, 377 F.2d 428 (5th Cir. 1967) (footnote omitted), when it concluded that appellants should be permitted to *relitigate* the standing issue.

(Slip opinion at 4—5. Emphasis supplied.)

The emphasized portions of the panel's decision reflect a fundamental misconception. Petitioner Meyer never sought an opportunity to present *additional* evidence or *relitigate* the standing issue because the issue was never litigated *ab initio*. From this flawed premise flows the erroneous application of the "law of the case" doctrine.

The panel opinion's reliance upon *White v. Murtha, supra*, to defeat the opportunity of Meyer to testify is misplaced and turns the "law of the case" doctrine on its head. *Murtha* actually supports the Petitioner's right to testify. *Murtha* states the general definition of "law of the case" as a rule predicated upon the principle that litigation should come to an end. "[I]t would be impossible for an appellate court 'to perform its duties satisfactorily and efficiently' and expeditiously 'if a question, once considered and decided by it were to be litigated *anew* in the same case upon any and every subsequent appeal' thereof." 377 F.2d at 428. [Citations omitted; emphasis supplied]. "Law of the case" cannot bar the Petitioner's right to be heard in court because he has never sought to litigate *anew*. Rather, Meyer seeks a primary opportunity.

Additionally, even the *Murtha* case recognizes that the doctrine is not an "inexorable command", 377 F.2d at 431, and the doctrine is *not* to be applied where it would "work a manifest injustice." 377 F.2d at 432.

The manifest injustice apparent here is of *constitutional magnitude* because Meyer was deprived of his due process right to be heard in violation of the Fifth Amendment. That violation, in turn, effectively negated his right to contest a Fourth Amendment violation.

This Court has recognized that a state prisoner's right to a full and fair opportunity to litigate a Fourth Amendment claim is so fundamental that it is the *only* claim that can be made in a federal habeas corpis action seeking redress for a Fourth Amendment violation. *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037, 49 L.Ed.2d 1067 (1976). *A fortiori*, an accused in federal court such as Meyer, who is deprived of the full and fair opportunity to litigate his Fourth Amendment claim, must be afforded relief.

This proceeding is the only available vehicle for the redress of the Petitioner's claim and for the prevention of its recurrence in future cases. It is of no consolation to the Petitioner that the panel decision has now informed him that the original panel "implicitly" held that he was not entitled to litigate his claim because the reversal did not specify reversal and remand for a new suppression hearing. And that "after-the-fact" notice to the Petitioner cannot be squared with fundamental notions of due process. The "reversal" did not so limit itself expressly, and even if it had, it should now be corrected for the Petitioner and future litigants whose right to testify is deprived through good faith reliance upon the representations of the judiciary.

Meyer was correct in assuming that the government would be estopped from denying him the opportunity to testify given that the Magistrate told him he did not have to testify because his

standing to challenge the search and seizure was without dispute, and the district judge agreed.

Without Meyer's testimony, it cannot be fairly stated that he could not, under any circumstances, have established standing, and the opinion below and the original appellate opinion never suggested same. Standing to challenge a search and seizure of a third party's premises has been recognized in the Eleventh Circuit. *See e.g., United States v. Torres,* ___ F.2d ___ (11th Cir. 1983) (Case No. 81-5827, opinion filed May 5, 1983), and cases cited therein.

The misapplication of the "law of the case" doctrine in this cause has set a dangerous precedent. An accused may now be informed that standing has been found by the lower court and that there is no need for his testimony on the issue. Relying upon same, the accused properly does not testify. The government may appeal, prevail, and then bar the accused from testifying to prove standing. There is no reason why this precedent would not extend beyond the parameters of this case to work miscarriages of justice in other criminal or civil proceedings. A litigant must be able to rely upon the representations and findings of magistrates and district courts without fear of losing on appeal and being forever barred from litigating good faith claims by virtue of his reliance upon those representations.

By not affording Petitioner Meyer a remand for a suppression hearing where all of the relevant facts could be developed, and where the lack of developed facts was due to the initial finding of the Magistrate and was in no way attributable to the defendant, this case is in clear conflict with *Combs v. United States,* 408 U.S. 224, 92 S.Ct. 2284, 33 L.Ed.2d 308 (1972) (because the record was virtually barren of the facts necessary to determine the defendant's right to contest the search and seizure, the United States Supreme Court remanded the case for further proceedings). It might also be noted that the case has resulted in intra-district conflict with *United States v. Bachner,* ___ F.2d

____ (11th Cir. 1983) (Case No. 81-6203), opinion filed June 6, 1983) (suppression order vacated on appeal by the government where the record was incomplete because relevant evidence was excluded, and the exclusion was not attributable to the government). Meyer should be afforded the same opportunity that was afforded the government in *Bachner*.

CONCLUSION

The Petitioner requests that certiorari be granted, his convictions be vacated, and this cause remanded to the trial court for a hearing on the motion to suppress, affording the Petitioner an opportunity to testify and prove standing, consistent with the Fourth and Fifth Amendments to the Constitution of the United States.

Respectfully submitted,

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Counsel for Orville Meyer

Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5397
NON-ARGUMENT CALENDAR

UNITED STATES OF AMERICA
Plaintiff-Appelle,

v.

WALTER McMAHON AND
ORLVILLE MEYER,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida.

REHEARING AND REHEARING EN BANC
Denied Sept. 1, 1983

Before RONEY, VANCE and ANDERSON, Circuit Judges.

PER CURIAM:

Appellants, Elton Orville Meyer and Walter McMahon, seek review of their convictions for conspiracy to possess and distribute cocaine, possession with intent to distribute cocaine, distribution of cocaine and, in Meyer's case, use of a communication facility in the commission of a felony. [1] We affirm.

The basic facts of this case are set out in *United States v. Meyer*, 656 F.2d 979 (5th Cir. Sept. 21, 1981). That decision of the former Fifth Circuit reversed the district court's order suppressing certain evidence against appellants. On remand, appellants were convicted in a jury trial. In this appeal from those convictions, appellants raise four contentions.

[1,2] Appellant's first contention can be disposed of rather easily. Although appellants argue that the district court erred in failing to charge the jury that it should consider evidence of a witness's mental condition in judging the credibility of his testimony, a review of the record indicates that appellants did not request such an instruction and made no objection to the instructions the court actually gave regarding the credibility of witnesses. Under Fed.R.Crim.P. 30, objections to jury instructions which are not timely made are waived unless the

FOOTNOTES:

1. One of appellants' co-defendants, Joe E. Abbott, was convicted in a separate proceeding, and the conviction was affirmed on appeal. *United States v. Abbott*, 665 F.2d 353 (11th Cir. 1981). The government apparently dismissed the charges against another co-defendant, Steven Hodlow.

2. In *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir.1982), this court adopted as binding precedent all of the post-September 30, 1981, decisions of Unit B of the former Fifth Circuit. *Id.* at 34.

instruction consistutes "plain error." *United States v. Thevis*, 665 F.2d 616, 65 (5th Cir.) (Unit B), *cert. denied*, ____ U.S. ____, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982).[2] A jury charge constitutes "plain error" only if the charge, considered as a whole, is so clearly erroneous as to result in a likelihood of a grave miscarriage of justice or to seriously affect the fairness, integrity or public reputation of judicial proceedings. *Id.* Appellants have not contended, nor could they reasonably contend, that the district court's failure to give the instruction that they now request constituted "plain error" under this standard. The district court gave standard instructions regarding the credibility and impeachment of witnesses, informing the jury that it was the sole judge of the credibility of each witness's testimony whatever weight it thought the testimony deserved. Even assuming *arguendo* that the court erred by not elaborating on these instructions, the court's charge certainly was not so erroneous as to result in a miscarriage of justice or to adversly affect judicial proceedings. Accordingly, we reject appellants' challenge to the jury instructions.

Appellants' second contention is that the district court erred when it failed to give them an opportunity to present evidence to establish their standing to challenge the constitutionality of a search of co-defendant Hodlow's apartment and the seizure of a kilogram of cocaine. The district judge declined to conduct a hearing on the standing issue because he believed the former Fifth Circuit had already determined that appellants lacked standing to make a Fourth Amendment challenge. Our review of the record indicates that the district judge was correct. In *United States v. Meyer, supra*, the former Fifth Circuit stated:

> The issue on appeal is whether defendants had a legitimate expectation of privacy in the area where the cocaine was seized, entitling them to challenge the legality of the search and seizure. We hold they did not have this expectation, and reverse the district court order which granted their motions to suppress.

656 F.2d at 980.

[3] Appellants attempt to circumvent the former Fifth Circuit's holding by arguing that they did not have a full opportunity to present evidence of standing at the original suppression hearing and, therefore, that they should have been allowed to present addidional evidence on the standing issue. The difficulty with this argument is that it was made and rejected on the previous appeal. In their reply brief, appellants note that in the prior appeal they argued that "even if standing had not been established, the defendants were entitled to prove standing at a new evidentiary hearing" in the district court. The former Fifth Circuit implicitly rejected this argument because, rather than remanding for a new evidentiary hearing, the court held that defendants had failed to establish an expectation of privacy in the area where the cocaine was seized and reversed the suppression order. 656 F.2d at 980-82. Thus, the district court correctly applied the "law of the case" doctrine, *see White v. Murtha*, 377 F.2d 428 (5th Cir. 1967),[3] when it concluded that appellants should not be permitted to relitigate the standing issue.

Appellants' final two contentions relate to psychiatric reports prepared by two doctors who had examined the government's key witness, former DEA Agent Marshall. At the outset of the trial, appellants' counsel asked for copies of the reports. The prosecuting attorney did not have copies of the reports in his case file, and the trial judge decided to proceed with the trial rather than wait until appellants could obtain copies of the reports. Appellants now argue that the government's failure to provide them with copies of the psychiatric reports violated *Brady v. Maryland*, 373 U.S. 83, 86, 83 S.Ct. 1194, 1196, 10 L.Ed. 2d 215 (1963), and also deprived them of their Sixth Amendment right to confront and cross-examine witnesses.

3. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc) the Eleventh Circuit adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

[4] "To establish a violation of *Brady* . . ., the appellants must demonstrate (1) that the prosecution suppressed evidence (2) that was favorable to the appellants or exculpatory and (3) that the evidence was material . . . If the defense makes a specific request for material that is suppressed the standard of materiality is whether the suppressed evidence might have affected the outcome of the case." *United States v. Blasco*, 702 F.2d 1315, 1327 (11th Cir.1983) (citations omitted). Even if we assume, *arguendo*, that the government suppressed evidence which was favorable to appellants, we cannot conclude that appellants have demonstrated that the psychiatric reports constituted *material* evidence. On cross-examination at trial, Marshall testified that he had received a 40% psychiatric disability retirement from the government, that within two weeks of the events which led to this case he had been the subject of two internal DEA investigations which concerned accusations that he had made obscene phone calls and had maliciously destroyed another person's automobile, that he had been diagnosed as having a sociopathic personality with destructive and self-destructive tendencies, that a person with such a personality has difficulty dealing with authority, and that prior to the events which led to this case he had been under a great deal of personal stress and had been taking valium for several years. Obviously, appellants had an ample opportunity to attack the crediblity of Marshall's testimony, and there is no indication in the record that this attack would have been strengthened if appellants had been given copies of the psychiatric reports they sought. Under these circumstances, we have no reason to believe that disclosure of the psychiatric reports would have affected the outcome of the case. Thus, appellants have not established a *Brady* violation because they have failed to demonstrate the materiality of the evidence which the government allegedly suppressed.

Morever, "the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself." *United States v. Prior*, 546 F2d 1254, 1259 (5th Cir. 1977). *See also, e.g., United States v. Brown*, 628 F.2d 471, 474 (5th Cir. 1980) ("In no way can information known and available to the defendant be said to have been suppressed by the Government.") Appellants' counsel knew, or should have known, about the two psychiatric reports long before the day of trial because the existence of the reports was revealed at the trial of appellants' co-defendant, Abbott. *See United States v. Abbott*, 665 F.2d 353 (11th Cir. 1981). Had they exercised reasonable diligence, appellants' counsel could have contacted the doctors who prepared the reports, just as Abbott's attorney did,[4] and obtained any relevant information or called them as witnesses. Consequently, appellants' *Brady* claim is without merit.[5]

[5] Similarly, appellants' Sixth Amendment Confrontation Clause claim lacks merit. As noted above, the record simply does not support appellants' contention that without the psychiatric reports they were unable to cross-examine Marshall effectively. *Cf. United States v. Abbott, supra* (rejecting a similar challenge made by co-defendant Abbott regarding the "limitations" on cross-examination at his trial).

The judgment of the district court is AFFIRMED.

4. Abbott's attorney not only obtained copies of the reports, but also talked with at least one of the doctors who had examined Marshall. *United States v. Abbott, supra.* Nevertheless, Abbott's attorney "declined to call either doctor as a witness," *id.*, a fact which supports our conclusion above that appellants have not demonstated that disclosure of the reports would have affected the outcome of the case.

5. The trial judge summarized the facts succinctly during a colloquy at trial when he made the following statement to one of appellants' attorneys: "You don't have the reports in your file to cross-examine him on because you haven't done anything for two months." Record on Appeal, vol. 3, at 106.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 82-5397

UNITED STATES OF AMERICAN,
Plaintiff-Appellee,

versus

WALTER McMAHON and
ORVILLE MEYER,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 8, 11 Cir., 1983, ____ F.2d ____).

Before RONEY, VANCE and ANDERSON, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE, FLORIDA

NO. 80-214-CR-NCR

UNITED STATES OF AMERICA,

Plaintiff,

vs

JOSEPH ELLINGTON ABBOTT,
ORVILLE ELTON MEYER,
STEVEN MARION HODLOW,
WALTER McMAHON

Defendants.

The above-entitled cause came on for hearing on Motion to Suppress before The Honorable PATRICIA JEAN KYLE, United States Magistrate, pursuant to notice.

UNITED STATES COURTHOUSE

United States Courthouse,
299 East Broward Boulevard,
Fort Lauderdale, FLorida,
August 2, 1980,
12:00 o'clock Noon.

APPEARANCES:

ATLEE W. WAMPLER, III, United States Attorney, by STEPHEN GILLMAN, Assistant United States Attorney, appearing on behalf of the Plaintiff.

JEROME SANFORD, ESQ.,
appearing on behalf of the Defendants, Abbott and Meyer.

BRUCE FLEISHER, ESQ.
appearing on behalf of the Defendant, Hodlow.

Government has not responded to any motions to suppress by statement of facts or otherwise. So, I am unfamiliar with the Government's position.

MR. GILLMAN: I would point out for the Court's benefit that we were served with copies of these on Friday.

THE COURT: Well, you got them before I did.

MR. GILLMAN: We got them on Friday, Your Honor, and it was simply impossible to respond in a written form by today.

THE COURT: I understand that. I'm trying to give everyone the benefit of a maximum amount of participation, both the Government, as well as the Defendant. Obviously, when this is all over, if I believe that *Mr. Meyer does not have standing in all or part of, I am going to give Mr. Sanford notice of that effect and, then, at that time if he wishes to bring Mr. Meyer forward to allow Mr. Meyer to testify and establish his standing, I will permit him to do so.*

MR. GILLMAN: Your Honor, my point is at the present time, based on the record before the Court, there is absolutely no indication as to why Mr. Meyer was in the apartment. For all the Court knows, he could have been a burglar that was in

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